AILA NORCAL/EOIR Liaison Questions and Answers
August 28, 2008 Meeting

Information regarding the "Vertical Prosecution" pilot program

Beginning September 2, the San Francisco Immigration Court and the San Francisco Office of the Chief Counsel, in a joint agency effort, will be implementing "Vertical Prosecution" on a pilot program basis. Under VP, at the time each case is set from Master Calendar to Individual Calendar, the case will be assigned to a specific DHS Assistant Chief Counsel (ACC) who will remain the DHS attorney for the life of the case. Once a case is designated for VP, both the judge and the parties will know which ACC is responsible for handling every aspect of that case, including each court appearance, motions, and appeals. We anticipate a number of benefits from VP. These include improved communications between the private bar and DHS on each case, since the private bar will now always have a specific contact for each case; more opportunity for the parties to identify and narrow issues prior to adjudication since ACC's will be following cases from Master Calendar onwards; and fewer instances in which cases are "double booked" for the same time slot.

Beginning September 2, private counsel will know who the ACC is for each case when it is set to Individual Calendar during a Master Calendar hearing. In addition, the Court has been working with DHS to assign all pending Individual Calendar cases to specific ACC's. Private counsel will then be able to find out which ACC is assigned to a particular case by contacting the Office of Chief Counsel or the Immigration Court. In keeping with VP, the court will expect that private counsel will list the specific DHS attorney on all Certificates of Service.

The pilot program will last at least 18 months beginning September 2. As a pilot program, we will be studying the effects of VP on the court's dockets and a determination will be made whether to implement VP on a permanent basis. In that connection, we will be looking to the private bar for comments on the advantages and disadvantages of Vertical Prosecution once we have all had some experience with it

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Questions and Answers

1. What is the status of Judge Simpson's caseload? Are his cases currently being reassigned and/or re-calendared? Does EOIR anticipate he will return to the bench shortly?

RESPONSE:

Judge Simpson returned to the bench on August 18, 2008. Judge Simpson's pending caseload is now at just over 200 cases, and his docket has largely been reassigned to other Immigration Judges. The cases remaining on Judge Simpson's docket are cases in which he has previously heard testimony or which have complicated legal issues.

2. What is the status of Judge Geisse's caseload? Are her cases being reassigned to a visiting judge? How long will the visiting judge be assigned her caseload?

RESPONSE:

Judge Geisse has been assigned to an extended detail at the Tacoma Immigration Court. She will be on detail in Tacoma through the end of August 2008. The cases on her docket are being reset to future dates on her docket. It is anticipated she will return to the bench in San Francisco starting in September. There will not be a visiting Immigration Judge replacing her while she is on detail.

3. When does EOIR anticipate Judge Maggard to begin hearing cases at San Francisco EOIR? His caseload continues to be continued and re-calendared in anticipation of his arrival.

RESPONSE:

EOIR does not, at this time, have an anticipated entry on duty date for the next San Francisco Immigration Judge.

4. What are Judge Ramirez's responsibilities as the pro bono judge for San Francisco EOIR? May we contact her directly concerning pro bono matters and concerns?

RESPONSE:

Guidelines for pro bono liaison judges are included in OPPM 08-01 (Facilitating Pro Bono Legal Services), which provides, in part, as follows:

> [The pro bono liaison judge] represents the judges of that court in interactions with outside entities regarding matters involving pro bono representation. . . . The pro bono liaison judge, together with the court administrator, should meet regularly with local pro bono legal service providers to discuss improving the level and quality of pro bono representation at the court. Such meetings should be used to develop and refine local procedures to encourage pro bono representation, bearing in mind the particular needs and circumstances of each court. Pro bono liaison judges should encourage and, insofar as appropriate, facilitate discussion between government and pro bono counsel. They should also consult with the EOIR Legal Orientation & Pro Bono Program (LOPBP) to strengthen the agency's public outreach and to better coordinate the agency's support of pro bono representation.

As the pro bono liaison judge for the San Francisco court, IJ Ramirez may be contacted directly.

5. An EOIR Fact Sheet dated April 22, 2008 states that the San Francisco Immigration Court has a juvenile docket. What does that mean and how will procedures on this

docket be different from a normal docket? Which judges are responsible for hearing juvenile cases? Have all of the San Francisco judges been trained on procedural issues with respect to juvenile cases?

RESPONSE:

The juvenile docket referenced in the EOIR Fact Sheet dated April 22, 2008, is for unaccompanied alien children. Judge Yamaguchi handles this juvenile docket in San Francisco. The docket is generally scheduled at 1:00 pm on the third Monday of each month. OPPM 07-01 (Guidelines for Immigration Court Cases Involving Unaccompanied Alien Children) provides guidance and suggestions for adjudicating cases where the respondent is an unaccompanied alien child.

6. What is the status of the proposed amendment to the pro bono master calendar procedures? Specifically, the amendment allows pro bono attorneys (who have verified their status as a pro bono attorney with the San Francisco Bar Association pro bono attorney of the day) to present their pro bono case ahead of non-pro bono cases at a master calendar hearing regardless of where their name appears on the Court master calendar sign in list.

RESPONSE:

The court has decided that the proposed amendment to the master calendar sign in procedure is acceptable. However, the court has not been able to implement the proposed procedure due to time limitations caused by a number of large, high priority projects. The court will look to implement the proposed procedure later in the year. This issue will be discussed and procedures finalized during the quarterly NORCAL AILA/EOIR meeting this fall.

7. The government often misses filing deadlines, files late briefs and documents, and the IJs generally accept their filings without consequences to the government for the tardiness. However, the same treatment is typically not extended to Respondent's counsel. Can the court enforce the deadlines more strictly for the government as it generally does for Respondent's counsel? If not, why not?

RESPONSE:

The filing deadlines in the Practice Manual apply both to respondents and DHS counsel. In addition to the deadlines in the Practice Manual, Immigration Judges have the authority to set and extend filing deadlines in any given case. *See* OPPM 08-03: *Application of the Immigration Court Practice Manual to Pending Cases*; Practice Manual Chapters 3.1(b) (Timing of submissions), 3.1(c)(iv) (Motions for extensions of filing deadlines). Further, Immigration Judges always have the discretion to determine whether a filing is timely and, if untimely, to determine the consequences of the late filing. Since decisions regarding timeliness are made by Immigration Judges on a case-by-case basis, any concerns regarding the timeliness of documents filed by the opposing party should be raised with the Immigration Judge in that particular case.

8. Double booking and rescheduling: Is there any way for the Court to advise attorneys ahead of time that the Judge does not intend to go forward with their case on the scheduled hearing date? Often we bring respondents, witnesses, and experts to Court, are ready to go forward, and then are told that the case is being continued. This causes great inconvenience for attorneys, as well as respondents, witnesses and experts who usually have to take off of work to attend the hearing.

RESPONSE:

Under the new Vertical Prosecution Pilot Program beginning September 2, 2008, the number of cases that do not go forward as a result of double booking is expected to decline considerably.

Is it possible to limit the number of cases a Judge can schedule for an individual merit hearing? Members report numerous instances where 3-4 or more cases for one morning or afternoon merit session have been scheduled. It is impossible to proceed with all the cases during the scheduled timeframe. This manner of double booking requires that attorneys, respondents, and witnesses return to Court for 3-5 or more scheduled merit hearings. As stated in question 8, this causes a great inconvenience for attorneys, respondents, and witnesses.

RESPONSE:

As mentioned in the response to the first part of this question, the number of cases that do not go forward as a result of double booking is expected to decline considerably under the new Vertical Prosecution Pilot Program.

9. The 9th Circuit's decision in Chaly-Garcia v. U.S., 508 F.3d 1201 (9th Cir. 2007) states that Salvadorans & Guatemalans who filed for asylum only prior to the ABC registration deadlines are de facto ABC class members. Before this decision, individuals were not considered ABC class members if they did not file a separate ABC registration. This is important because ABC class membership means that these individuals are now eligible for NACARA relief.

A member states that he believes that the OCC takes that position that the IJ's cannot make ABC determinations, and that the matter must be remanded to the Asylum Office. In effect, the OCC argues that the IJ's don't have jurisdiction over this issue. OCC's position does not appear to be supported by the regulations, and will require significant delay in adjudication of cases that must be returned to the Asylum Office for a new ABC determination.

Does EOIR have a position on their jurisdiction to determine ABC class membership?

Does EOIR have a policy for cases that are identified as clearly falling under Chaly-Garcia?

RESPONSE:

EOIR does not provide advisory opinions concerning jurisdiction. Questions regarding EOIR policy are best addressed through the National AILA/EOIR Liaison Committee.

10. What is EOIR's policy regarding testimony of witnesses who are undocumented? For example, a member reports that she would like to submit a declaration from respondent's mother, who is undocumented, relating to his one-year bar issue. Will this pose a problem if she has to testify? Can/should she still testify even though she's undocumented or is this a non-issue?

RESPONSE:

EOIR does not have a policy regarding the testimony of witnesses who are undocumented.

11. When a motion for change of venue is filed, is there a deadline for the IJ to make a decision on the motion after the time for a response has passed? A member requests that the IJ rule on these motions *prior to* the scheduled hearing, especially if they are not opposed. This is especially important with this type of motion, which is necessarily based upon the hardship to the respondent of traveling to the San Francisco Immigration Court when the respondent lives closer to a different court.

RESPONSE:

Chapter 3.1(b)(i)(A) of the Practice Manual states that, "[f]or master calendar hearings involving non-detained aliens, filings must be submitted at least fifteen (15) days in advance of the hearing *if requesting a ruling at or prior to the hearing*." (Emphasis added.) EOIR encourages Immigration Judges to rule on motions promptly. However, even with timely motions, it is not always possible for Immigration Judges to rule in advance of hearings as, in reviewing the motion, the Immigration Judge may identify facts or legal issues that need to be developed further. While there is no deadline for ruling on motions to change venue, a party may contact the Immigration Judge's clerk to inquire whether the Immigration Judge has ruled on the motion.

12. When a motion for a continuance is filed, is there a deadline for the IJ to make a decision on the motion after a time for a response has passed? A member requests that the IJ rule on the motions promptly, especially if they are not opposed. This is especially important with this type of motion, which, if denied, will require some sort of alternative arrangement to be made to compensate for the reason that the motion was originally made.

RESPONSE:

See the response to question 11, above. While there is no deadline for ruling on motions for continuances, a party may contact the Immigration Judge's clerk to inquire whether the Immigration Judge has ruled on the motion.

13. A member would like to remind the IJs to please always mark the applications for relief that are on file on the hearing notice. This is especially important for cases where the respondent was referred to EOIR after filing an affirmative adjustment of status application with CIS. In these case, the hearing notice will be the only evidence that the I-485 remains pending, as CIS's internal system shows that the application has been denied. Evidence that the application is pending is required for an application for an employment authorization document.

RESPONSE:

In San Francisco, when the new biometrics regulations were issued, the Immigration Court stopped indicating on the hearing notices the type of applications for relief that had been filed.

14. What is the difference between biometrics and fingerprinting, and what does the Court require to complete a case?

RESPONSE:

For certain applications for relief from removal, the Department of Homeland Security (DHS) is required to complete background and security investigations. *See* 8 C.F.R. § 1003.47. Background and security investigations, however, are entirely within the control and purview of DHS. Therefore, questions regarding biometrics and fingerprinting should be addressed to DHS.

Please note that guidance to the Immigration Courts regarding background and security investigations for respondents in Immigration Court proceedings is contained in OPPM 05-03 (Background and Security Investigations in Proceedings before Immigration Judges and the Board of Immigration Appeals).

<u>Questions regarding the practice manual</u>

15. The EOIR manual requires that the attorney submit a criminal history chart addressing respondent's convictions and the possible immigration consequences. Is this still required, or is the chart requirement under review?

RESPONSE:

The criminal history chart provisions in Chapters 3.3(f) and 4.16(b)(iii) are currently under review. While these provisions are under review, Immigration Judges have been instructed not to require parties to submit criminal history charts.

16. What, if any, leeway will EOIR provide for inadvertent failure to comply with the manual rules?

RESPONSE:

OPPM 08-03 (Application of the Immigration Court Practice Manual to Pending Cases), states that:

> Once the Practice Manual goes into effect, judges, court administrators, and court staff should be mindful . . . [that the] public will need time to become familiar with the Practice Manual. While the parties who appear before the courts are becoming familiar with the Practice Manual, judges should be flexible in applying the provisions of the manual and are encouraged to accommodate appropriate requests regarding scheduling and deadlines on a case-by-case basis.

In addition, EOIR has issued guidance to court staff on how to process defective filings under the Practice Manual. In this guidance, court staff have been instructed that, while the parties who appear before the courts are becoming familiar with the Practice Manual, staff should be flexible in applying the Practice Manual's provisions, and are encouraged to be especially helpful to the public on how to comply with the Practice Manual.

17. Are all supporting documents filed with the Court supposed to be copies, and not original? See Practice Manual § 3.3(d)(iii). If yes, does this include declarations by respondents and witnesses?

RESPONSE:

Under Chapter 3.3(d)(iii), "[p]hotocopies of supporting documents, rather than the originals, should be filed with the Immigration Court and served on the Department of Homeland Security (DHS). Examples of supporting documents include identity documents, photographs, and newspaper articles." However, since a declaration requires an original signature, the original declaration should be submitted to the Immigration Court, unless otherwise directed by the Immigration Judge.

18. Does the cover page need to be numbered?

RESPONSE:

No, the cover page does not need to be numbered. The requirements for cover pages are found in Chapter 3.3(c)(vi) (Cover page and caption) and Appendix F (Sample Cover Page).

19. Is there any occasion where a table of contents would not be needed for a filing? For instance, if we are filing just one document is a table of contents necessary?

RESPONSE:

Under Chapter 3.3(c)(iii) (Pagination and table of contents), "[a]ll documents, including briefs, motions, and exhibits, should always be paginated by consecutive numbers placed at the bottom center or bottom right hand corner of each page. Whenever proposed exhibits or supporting documents are submitted, the filing party should include a table of contents with page numbers identified."

While a table of contents is generally not necessary for filings containing only one document, the filing should include a cover page. *See also* Chapter 3.3(c)(vi) (Cover page and caption).

20. A new EOIR memo states that all motions will be rejected if not accompanied by a proposed order, but ACIJ Griswold said at the AILA conference that the proposed order wasn't really a requirement, but more of a good idea to make things go along more smoothly. Is a written order necessary/will a motion filing be rejected if it does not contain a proposed order?

RESPONSE:

Under guidance given to court staff on processing defective filings, motions submitted by attorneys are rejected if no proposed order is included. This guidance is based on Chapter 5.2(b) of the Practice Manual, which states "all motions must be accompanied by a proposed order for the Immigration Judge's signature." This provision is intended to make the processing of motions more efficient.

21. 4.15(i) Pleadings. Representatives are strongly encouraged to use the oral pleading format. (j) Written pleadings.- In lieu of oral pleadings, the IJ may permit represented parties to file written pleadings.

    Do you agree that the above means that an IJ may no longer require a written pleading?

RESPONSE:

Chapter 1.1(c) states that "[n]othing in this manual shall limit the discretion of Immigration Judges to act in accordance with law and regulation."

22. 4.15(o)(ii) Video testimony. Witnesses may testify by video.

    Is this possible in San Francisco? If not, any plans to make it possible?

RESPONSE:

The Practice Manual permits witness testimony via video at the discretion of the Immigration Judge, but whether such testimony is possible depends on the availability of video resources and the particular circumstances of the case. Please be advised that, at present, the San Francisco Immigration Court has only one video unit and that unit is frequently in use.

22. 5.10(b) Motion to Advance. Considering the strict criteria for a motion to advance, can we still continue to file a motion to advance only because Respondent has become eligible for adjustment and therefore provide the IJ with an opportunity to complete the case in a much shorter individual hearing or at the end of a master hearing and as a result opening a half-day individual hearing, which was set for asylum, cancellation or both?

RESPONSE:

Immigration Judges adjudicate motions to advance on a case-by-case basis in accordance with law and regulation. Chapter 5.10(b) does not contain an exhaustive list of all the reasons for which a hearing can be advanced. Rather, it states that "[m]otions to advance are disfavored," and it contains "[e]xamples of circumstances under which a hearing date might be advanced." Therefore, motions to advance are not limited to the grounds listed in Chapter 5.10(b).

24. 9.3(c) Requesting a bond hearing. A request for a bond hearing may be made at the discretion of the IJ by telephone.

Do San Francisco IJs allow the request for a bond hearing to be made by telephone?

RESPONSE:

Chapter 9.3(c) of the Practice Manual states that "a request for a bond hearing may be made orally, or at the discretion of the Immigration Judge, by telephone." Accordingly, whether to allow requests for bond hearings to be made by telephone is a decision to be made by the Immigration Judge in the exercise of discretion.